

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1330

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

73 CR. 914

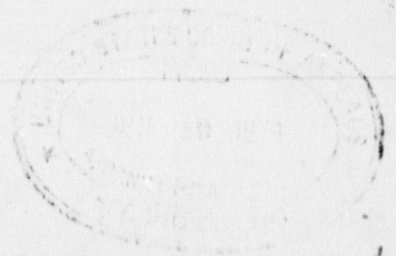
Docket No. 74-1330

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

ARIEL FERNANDEZ-TORRES,
Defendant-Appellant.

APPELLANT'S BRIEF



I

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Issues Presented For Review

Was the defendant fairly tried when:

- 1) he was denied an opportunity to examine for himself an exhibit in evidence in a pre-trial hearing, although turned over to his counsel;

- 2) the court failed to rule on defendant's contention that he was prejudiced by a pre-arrest delay of over 2 years since the commission of the crimes in the indictment, and
- 3) the court inhibited the full development of defendant's cross-examination and summation, and failed to charge the jury regarding the relevancy of the 2 year period of delay?

STATEMENT OF THE CASE

Proceedings And Disposition in District Court

Defendant-Appellant was convicted after trial of four violations of Title 21 U.S.C. 841(a)(1), specifically, he stands convicted of two counts of alleged possession of a quantity of heroin hydrochloride with intent to distribute, and two additional counts alleging distribution of the same heroin hydrochloride. He appeals from a judgment of the court below, filed March 8, 1974, sentencing the defendant to a committment for 8 years on the first two counts and 6 years on the second two counts, all to run concurrently.

THE FACTS

Defendant was indicted on October 11, 1973, for unlawful possession of a narcotic drug with intent to distribute, and the

distribution of same narcotic drug on June 9, 1971 and July 20, 1971. (2A). * A complaint had been filed and an arrest warrant issued on February 7, 1972, concerning the alleged violation of July 20, 1971. Defendant was arrested on October 5, 1973, one year and eight months after the filing of the complaint, and more than two years after the alleged violations (6A - 7A).

Defendant moved to dismiss the indictment due to the delay from the date of the alleged violations and filing of the complaint until his arrest on October 5, 1973, during which time he contended that he remained in the New York area and never took any steps to avoid prosecution. The government contended that the defendant was a fugitive and that the government had made diligent efforts to locate him. The defendant relied upon the Fifth and Sixth Amendments of the Constitution, as well as the Rules of the Second Circuit and the Eastern District of New York, regarding the prompt disposition of criminal cases (5A - 13A).

At the request of the defendant, a hearing was conducted on November 20th and November 27th, 1974, to resolve the factual issues raised by defendant's motion to dismiss on grounds of delay. During the course of the hearing, testimony was heard and evidence produced relating to the availability of the defendant during the period of delay, the diligence of the government in attempting to

* Numerals in parentheses refer to pages of Defendant's Appendix,

locate the defendant, and the prejudice to the defendant's ability to prepare his defense occasioned by the delay. The defendant testified that, in light of his limited education, addiction and mental state, including time spent in a mental institution, he was not able to recall the events of June 9th and July 20th, 1971 (22A - 27A).

However, the court indicated the purpose of the hearing would be limited to determining the issue of due diligence by the government (19A - 20A).

At the conclusion of the hearing, the court rendered its decision denying defendant's motion to dismiss and found that "the government did exercise due diligence in seeking defendant, whose identity, to say the least, is questionable and also to declare him a fugitive in making a search to bring him to trial" (29A).

In denying the defendant's motion to dismiss for delay, the court made no finding regarding any prejudice to the defendant that might have resulted from the pre-arrest delay (28A - 30A).

The principal government witness during the hearing was a Special Agent with the Narcotics Enforcement Agency. He testified regarding the various government efforts to locate the defendant during the delay period and submitted a multitude of Agent reports amplifying these efforts. At the conclusion of the Agent's testimony,

a request was granted to counsel for the defendant for an opportunity to review the approximately 50 pages of reports, which had been marked in evidence as Exhibit "1."

The transcript of the proceedings that followed this turn-over of Exhibit "1." to defense counsel is, unfortunately, incomplete, but, nevertheless, does indicate that the court did not permit the defendant to examine the Exhibit in evidence along with defense counsel, nor allow defense counsel to make notes from the exhibit, nor allow defense counsel to talk with the defendant so long as counsel held the Exhibit in his hands (15A - 17A). (The missing portion of the transcript would have indicated that, in addition to prohibiting the defendant from reading the reports, the court directed defense counsel to read the Exhibit at a position on the opposite side of the defense table from the defendant's position, in order to prevent the defendant from reading the Exhibit).

On the trial in chief, a twice-convicted government informer, Jimmy Valdez, was the principal government witness with regard to the June 9, 1971 counts. At no point in the course of his testimony did Valdez either attempt to positively identify, or actually identify, the defendant seated in the courtroom as being the Ray Fernandez with whom he had the various communications described in his testimony. When counsel for the defendant attempted to point out in his summation that Valdez had failed to identify

the defendant in the courtroom, a government objection was sustained by the court, thereby precluding full development of this non-identification argument (53A - 54A).

Special Agent Arthur Carter testified that he met with the defendant and Valdez on June 9, 1971, in Dave's Blue Room, a bar in Brooklyn, in which conversations were had regarding a possible drug transaction (31A - 34A). Carter also testified that he had a second meeting with the defendant in the Oasis Bar in Brooklyn on July 20, 1971, at which time the defendant discussed another drug transaction and directed Carter to leave \$3,700 in a telephone booth in the bar, which Carter observed being removed from the booth by one Martha Velez (35A - 40A).

The defense argued, in its summation, that the circumstances of these brief barroom meetings, coupled with the nearly two and one-half year delay in this prosecution, impaired Carter's ability to identify the defendant (55A - 58A). Similarly, a formal request to charge was submitted by the defendant regarding consideration for the two year delay and the reliability of identification testimony (14A). The court's charge did not address itself to this point (59A - 60A).

Martha Velez testified that, on July 20, 1971, at the request of the defendant, she was present in the Oasis Bar in Brooklyn and removed a package from a telephone booth after observing a man

with the defendant place the package in the booth. After removing the package, Velez stated that she proceeded to No. 27 Jefferson Street, where she later gave the package to the defendant (41A - 44A).

Velez was herself arrested, detained 14 days, and threatened with prosecution in connection with her complicity with the defendant. On the occasion of her arrest by government agents, she made statements which incriminated the defendant and served as the basis for her trial testimony (45A - 52A). Attempts to cross-examine Velez regarding the voluntariness of her arrest statements were blocked by the court as being irrelevant to the trial proceedings (52A).

After a jury verdict of guilty on all four counts, the defendant was sentenced to a term of 8 years on counts 1 and 2, and 6 years on counts 3 and 4, all to run concurrently (4A).

ARGUMENT

I

THE DEFENDANT HAD A CONSTITUTIONAL RIGHT TO EXAMINE FOR HIMSELF ALL TANGIBLE EVIDENCE UPON WHICH AN ADVERSE JUDICIAL DETERMINATION WAS BASED

Basic to the concept of due process protections afforded by the Sixth Amendment is an opportunity for a defendant in a criminal trial to be confronted with the testimonial or documentary

evidence being submitted by the government against the defendant's interest. Chambers vs. State of Mississippi, 410 U. S. 284, 294 (1973); Motes vs. United States, 178 U. S. 458, 474 (1900).

In the present case, at a pre-trial hearing, the government had offered a file (Exhibit "1.") purportedly reflecting extensive efforts by the government in attempting to locate the allegedly evasive defendant. The court, while allowing counsel to view the file but not to make notes from the Exhibit, prohibited the defendant himself from an examination of the file, in violation of his constitutional right of confrontation. It is well established that any time a person's interest is put in jeopardy by a proposed judicial or quasi-judicial determination, the person so affected must be afforded an opportunity to examine the evidence on which such a determination is based. Although the Supreme Court, in Greene vs. McElroy, 360 U. S. 474 (1959), was considering such a due process violation in an administrative proceeding, its admonition is appropriate, a fortiori, in this criminal proceeding. The offended petitioner in that case was denied an opportunity to examine governmental reports, upon which was based a denial of a security clearance. The court observed:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he

has an opportunity to show that it is untrue We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots." (P. 496).

Here, the defendant was denied an opportunity to examine government reports upon which an adverse judicial determination was made, i.e., that the government was diligent and the defendant was evasive.

The defendant's right of confrontation was not satisfied by merely affording defense counsel with an opportunity to examine the Exhibit. The defendant's constitutional right to assist and participate in his own defense had obviously been impaired when he himself was prohibited from reading the government Exhibit. The Exhibit in question dealt with the defendant and his activities. Certainly, the perspective and insights of a reading of this Exhibit by the defendant would be uniquely his, and different from the construction put on these reports by defense counsel. In any event, the constitutional right of confrontation assures that the defendant himself has the right to examine the evidence submitted against him. That right is not satisfied when counsel is presented with the Exhibit but the defendant is denied access.

II

DUE PROCESS WAS DENIED
WHEN THE COURT FAILED TO PASS UPON
THE QUESTION OF PREJUDICE TO THE
DEFENDANT OCCASIONED BY THE DELAY IN PROSECUTION

The defendant, in the court below, contended that the pre-arrest delay prejudiced his ability to prepare and make out a defense in violation of his Fifth and Sixth Amendment rights. However, the court, in denying defendant's motion to dismiss for delay, made no finding regarding the defendant's contention of prejudice caused by the delay.

The decision of the court was to the apparent effect that:

- 1) The government did exercise due diligence in seeking the defendant;
- 2) the identity of the defendant was questionable, and
- 3) the government was diligent in declaring the defendant to be a fugitive (29A).

The court, in addition to apparently raising some question concerning the proper identity of the defendant, never resolved the claim of prejudice caused by the delay. The defendant had argued that his situation was comparable with that of the defendant in Ross vs. United States, 349 F. 2d 210, D. C. Cir. (1965):

"Appellant is a man of limited education who is so circumstanced that there would appear to be very little to differentiate one day from another, especially as they begin to recede into the past. He kept no diary or other record, received little mail, and, at the time in question, had no regular employment. He testified, both at trial and on remand, that he could not remember, or, even after intensive discussions with his attorney, reconstruct the events of May 10, 1962." (Pg. 213).

In that case, the court reversed a narcotics conviction where prosecution was delayed for merely seven months after the alleged violation. That pre-arrest delay may unconstitutionally interfere with the right of a defendant to make out a defense has been recognized in this Circuit in United States v. Feinberg, 383 F. 2d 60, 65, 2d Cir. (1967):

"Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment + + + + +. For this reason, we must inquire whether there is a plausible claim of prejudice resulting from the delay in arrest + + + + +. Such a claim may arise + + + + + if the defendant is unable credibly to reconstruct the events of the day of the offense + + + + +." (See also, United States vs. Jones, 322 F. Supp. 1110, E.D. Pa., (1971). Indictment dismissed due to the defendant's inability to recall the events of a date on which he was charged with a sale of heroin, seven months prior to the indictment.)

Here, the defendant's inability to recall the circumstances of his life at or about the time of the alleged violations is indeed plausible, in the light of his limited education, his drug addiction, followed by a period as a psychiatric patient in a State mental institution. Defendant may very well, but for the frailty of his recollection, have been able to make out an entrapment defense, alibi, or obtain witnesses to the events alleged in the indictment. However, now, after more than two years delay, addiction, and psychiatric suffering and treatment, he claimed prejudice, but the court never ruled on his claim.

While the court would not have had an obligation to pass upon the defendant's claim of prejudice had the court found he was a fugitive during the delay period, there is no definitive finding by the court that he was a fugitive. In the absence of a finding that he was a fugitive, the court was required and failed to make a finding regarding the issue of prejudice. There can be no question that the claim of prejudice raised by the defendant was a relevant factor to be considered and decided by the court. United States vs. Fay, 313 F. 2d 620, 623, 2nd Cir. (1963). As the fact-finder, it was incumbent upon the court, not to merely indicate that the government was diligent but, further, to pass upon the question of prejudice. While admittedly a detailed opinion was not required, the court should have expressed itself on the question, to at least show an awareness of its relevance. Goldberg vs. Kelly, 397 U. S. 254, 271

(1970). Instead, the court seemed only concerned with the government's demonstration of due diligence, mistakenly convinced that defendant's claim based on delay could not prevail regardless of other factors set forth in Fay, supra, in the face of the finding of governmental diligence (19A - 20A).

III

THE DEFENDANT WAS NOT FAIRLY TRIED

WHERE THE COURT:

- a) Limited the cross-examination of a co-conspirator government witness regarding the voluntariness of her confessions implicating the defendant;
- b) usurped the function of the jury by accepting the government view of identification testimony, and
- c) refused to charge the relevance of the two-year delay and the identification testimony.

a) The witness, Martha Velez, was an apparent accomplice of the defendant with regard to the third count allegations of the indictment. On the occasion of her arrest, she indicated understandable apprehension and was threatened with prosecution, whereupon she

finally gave a full statement implicating herself and the defendant. These statements served as the basis for her trial testimony. While attempting to fully explore the voluntariness of these statements by the witness on cross-examination, the court sustained a government objection with the observation that "this is not that kind of a hearing" (52A), implying that only at a pre-trial hearing could a witness be examined regarding the voluntariness of a pre-trial statement. Such a pre-trial hearing would not likely be requested by the defendant, since he would not be aware of the prospective government witnesses or their anticipated testimony. In any event, the question of the voluntariness of the statements by Velez was not able to be fully developed, since the court ruled that such a matter was not appropriately to be developed at trial, but rather at some alternative unspecified hearing. The result of this ruling was an impairment of defendant's opportunity to fully test the credibility of Velez before the jurors.

b) The defendant, in the court below, challenged the government's identification proof, basically on the theory of limited time of exposure by the witnesses Valdez and Carter, coupled with the fact that these opportunities to observe the defendant were more than two years removed from the time of trial. The defendant's identification argument was buttressed by the fact that the government informer, Valdez, never did identify the defendant during the course of his testimony. Nevertheless, the court sustained a government objection

when defense counsel, in his summation, attempted to develop this identification failure (53A - 54A). This identification failure was an essential element of the defense and, by sustaining this objection, the court abused its discretion and prejudiced defendant's argument.

"The trial court has broad discretion in controlling the scope of closing argument. That discretion is abused, however, if the court prevents defense counsel from making a point essential to the defense.

"In regulating the scope of argument, the court should be guided by criteria that are related to the function of argument, i.e., to help the jury remember and interpret the evidence. The prosecutor and the defense counsel in turn must be afforded a full opportunity to advance their competing interpretations, and to emphasize the principals of law that favor their respective positions. The court should exclude only those statements that misrepresent the evidence + + +".
United States vs. Sawyer, 443 F. 2d 712, D. C.Cir., (1971).

This reference in defendant's summation was not a misrepresentation of testimony; it was not even argumentative, but rather an accurate description of the Valdez testimony. In spite of the fact that the trial testimony of Valdez does not contain an identification of the defendant seated in the courtroom, defense counsel was precluded from fully amplifying this identification argument by a court ruling sustaining the government objection, giving the impression that the court sided with the government. Rather than being non-committal on whether there was identification testimony by the witness Valdez,

and there undeniably was not, the court, in sustaining the government's objection to defendant's summation, gave every appearance of endorsing the government's position, and certainly precluded defense counsel from fully developing this identification argument in summation. At best, the court was equivocal in sustaining this unwarranted government objection, and then making a generalized observation about the function of the jury.

"When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore, he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his to make." Billeci vs. United States, 184 F. 2d 394, 403, D. C. Cir., (1950).

c) Finally, again on the issue of defendant's identification, a request was formally submitted that the court charge the jurors that they should consider the delay of over two years between the alleged crime and trial identification testimony. This the court declined to do and, instead, recited a boiler plate form of identification charge which, while adequate in its broad statement of the identification problem, had little specific bearing on the major identification question which permeated the record, namely, the two-year delay period, which was not mentioned in the charge at all (59A - 60A); nor was any corrective mentioned regarding the failure to identify the defendant

by the witness Valdez. Since there was absolutely no question that the record clearly demonstrated this delay period, the court's refusal to charge the jurors that they should consider it as a factor in regard to identification testimony was unfounded and unreasonable.

CONCLUSION

If not in isolation, certainly, the cumulative result of all these errors by the court was to deny the defendant a fair trial. Accordingly, the judgment of conviction should be set aside and the cause remanded for a new trial.

Dated: New York, N. Y.
June 19, 1974

Respectfully submitted,

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UNITED STATES
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C. J. ...